

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Midwest Independent Transmission,
System Operator, Inc.

Docket No. ER05-1423-000

ORDER ACCEPTING FOR FILING AND
NOMINALLY SUSPENDING UNEXECUTED AGREEMENTS,
SUBJECT TO REFUND AND OUTCOME OF RELATED PROCEEDINGS

(Issued October 31, 2005)

1. In this order, we accept for filing four unexecuted transmission service agreements and one unexecuted market participant agreement, filed by Midwest Independent Transmission System Operator, Inc. (Midwest ISO), to permit the invoicing of Green Mountain Energy Company (Green Mountain) for Seams Elimination Charge/Cost Adjustments/Assignments (SECA) charges. For the reasons discussed below, we will nominally suspend the agreements and make them effective December 1, 2004 and April 1, 2005, respectively, subject to refund and also to the outcome of the proceedings in Docket No. ER05-6, *et al.*

I. Background

2. On November 18, 2004, the Commission adopted a new long-term transmission pricing structure, effective December 1, 2004, for transmission service under the open access transmission tariffs (OATTs) of Midwest ISO and PJM Interconnection, LLC (PJM) for delivery to load in the combined Midwest ISO/PJM regions.¹ The new long-term pricing structure replaced the pancaked rates previously in effect with a license plate rate design. To mitigate the cost shifting that results when a license plate rate design replaces pancaked rates, the Commission also adopted the transitional SECA mechanism for the 16-month period between December 1, 2004 and March 31, 2006. During this transition period, the SECA mechanism recovers lost revenues from load serving entities in each license plate pricing zone in proportion to the benefits that these entities realize resulting from the elimination of rate pancaking. The Commission also provided for

¹ See *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,168 (November 18 Order), *clarified*, 109 FERC ¶ 61,243 (2004), *reh'g pending*.

implementation of the SECA mechanism on a sub-zonal basis, that is, separate SECA rates may be computed for different entities in a zone to reflect the differing relative benefits received.

3. In the November 18 Order, as clarified on November 30, 2004, the Commission directed Midwest ISO and the Midwest ISO Transmission Owners, PJM and the PJM Transmission Owners (PJM Parties), and American Electric Power Service Corporation, Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. and Dayton Power and Light Company to make compliance filings implementing the SECA methodology.

4. On February 10, 2005, the Commission accepted for filing these parties' November, December, and January compliance filings, suspended the filings for a nominal period, to become effective December 1, 2004, subject to refund and surcharge as appropriate, and established hearing procedures.² On June 16, 2005, the Commission accepted for filing further compliance filings that these entities filed in February, March, April, and May, suspended the filings for a nominal period, to become effective on various dates, subject to refund and surcharge, as appropriate, established hearing procedures, and consolidated these proceedings with the ongoing proceedings discussed above.³ On September 12 and October 6, 2005, the Commission accepted for filing additional revised compliance filings, suspended the filings for a nominal period, to become effective on various dates, subject to refund and surcharge as appropriate, established hearing procedures, and consolidated these proceedings with the ongoing proceedings discussed above.⁴

5. The compliance filings were based on data from calendar year 2002 and 2003 test periods. Midwest ISO's SECA charges for the lost revenues filed by PJM transmission owners are set forth in Schedule 22 and Attachments A and B (Schedule 22) of the

² *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,107 (2005) (February 10 Order), *reh'g pending*.

³ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,409 (2005) (June 16 Order), *reh'g pending*.

⁴ *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,267 (2005); *Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,010 (2005).

Midwest ISO OATT and the Midwest ISO open access transmission and energy markets tariff (TEMT).⁵

II. September 1 Filing

6. Pursuant to section 205 of the Federal Power Act (FPA)⁶ and Schedule 22 of the TEMT, Midwest ISO filed, on September 1, 2005, five unexecuted service agreements with Green Mountain (September 1 Filing): Attachment W – Form of Market Participant Agreement (Market Participant Agreement); and four Service Agreements for: Network Integration Transmission Service; Long-Term Firm Point-to-Point Transmission Service; Short-Term Firm Point-to-Point Transmission Service; and Non-firm Point-to-Point Transmission Service (Transmission Agreements). Under these five agreements, Midwest ISO will collect from Green Mountain the latter's assigned share of the lost revenues claimed by PJM transmission owners.⁷ Midwest ISO filed these five agreements under the provision in Schedule 22 that permits Midwest ISO to file unexecuted service agreements applicable to entities responsible for paying SECA charges which have not previously signed transmission contracts whether the entities request their submission or not.⁸ Midwest ISO requests effective dates of April 1 2005 for the Market Participant Agreement, consistent with the TEMT's effective date, and December 1, 2004 for the remaining four Transmission Agreements.

⁵ The TEMT provides for terms and conditions necessary to implement a market-based congestion management program and energy spot markets. This includes a day-ahead energy market and a real-time energy market, locational marginal pricing, and a market for financial transmission rights. When Midwest ISO commenced operation of financially binding energy markets on April 1, 2005, it also began providing transmission service under the TEMT instead of the OATT. *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005).

⁶ 16 U.S.C. § 824d (2000).

⁷ Monthly SECA charges to be assessed Green Mountain are listed in Attachment B to Schedule 22. Green Mountain states that it has already received an invoice from Midwest ISO for \$16,019,905.46 and that it anticipates being invoiced a total of \$32 million.

⁸ Schedule 22, section I.

III. Notice and Responsive Filings

7. Notice of Midwest ISO's filing was published in the *Federal Register*, 70 Fed. Reg. 54,735 (2005), with comments, interventions, and protests due on or before September 22, 2005. A motion to intervene was filed by FirstEnergy Service Company, on behalf of itself and its affiliated public utility operating companies, American Transmission Systems, Incorporated, The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company (collectively, FirstEnergy). Green Mountain filed a motion to intervene and protest.

8. On September 30, 2005, PJM Parties filed a motion to intervene out-of-time and to answer Green Mountain's protest. FirstEnergy and Midwest ISO also filed answers to Green Mountain's protest, on October 7 and 11, 2005, respectively. On October 17, 2005, Green Mountain filed its opposition to the grant of late intervention to PJM Parties and its answer to the answers filed by PJM Parties, First Energy, and Midwest ISO.

IV. Discussion

Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also grant PJM Parties' motion to intervene out of time given their interest in the proceedings, the early stage of these proceedings, and the absence of any undue prejudice or delay.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005) prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by PJM Parties, FirstEnergy, Midwest ISO, and Green Mountain and will, therefore, reject them.

Green Mountain's Protest

11. Green Mountain⁹ asks the Commission to reject Midwest ISO's September 1 Filing as patently illegal. Green Mountain states that it does not now and has not ever purchased transmission service or electric energy from Midwest ISO. It states further

⁹ Green Mountain states that it operates in several states to sell electricity generated from sources including wind, solar, water, geothermal, biomass, and natural gas. In Ohio, it is a licensed Competitive Retail Electric Service Provider supplying electricity to governmental aggregation programs.

that the invoices from Midwest ISO were sent originally to BP Energy Company (BP), and that only after BP disputed the invoices did Midwest ISO send them to Green Mountain.

12. Green Mountain contends that the FPA does not empower the Commission to authorize a public utility to collect charges from entities for which the public utility does not provide jurisdictional services. Green Mountain characterizes Midwest ISO as attempting to do just this, *i.e.*, collect SECA charges under Schedule 22, while not providing any service to Green Mountain. Green Mountain states that the five agreements apply to market participants or transmission customers or eligible customers, which Green Mountain is not, having never requested nor received service from Midwest ISO. Green Mountain adds that it has not agreed to be invoiced under any schedule of the TEMT and that it is not subject to Commission jurisdiction.

13. Green Mountain objects also to the requested effective dates, stating that Midwest ISO has provided no justification whatsoever and so has not shown good cause for these effective dates, as required under section 205(d) of the FPA.¹⁰ It states that Commission waiver of the 60-day prior notice requirement is inappropriate under *Central Hudson Gas & Electric Corp.*¹¹ because the September 1 Filing seeks to increase charges to Green Mountain from zero to \$32 million and because Green Mountain has had no notice that it would be invoiced for these SECA charges.

14. Should the Commission not reject Midwest ISO's September 1 Filing, Green Mountain asks the Commission to suspend the proposed rates for the statutory maximum five-month period and to set the filing for hearing.

Commission Response

15. We will accept for filing the four unexecuted Transmission Agreements and the unexecuted Market Participation Agreement, effective December 1, 2004, and April 1, 2005, as Midwest ISO has requested, subject to the outcome of the pending hearing in Docket No. ER05-6-001, *et al.*, and the pending requests for rehearing of the Commission's orders establishing the SECA mechanism and accepting the SECA compliance filings. Midwest ISO has acted according to the provisions of Schedule 22 that permit it to charge and collect SECA charges from Customers within its pricing zones and, if applicable, designated sub-zones. Schedule 22 defines Customers as both Transmission Customers and other entities in a zone that may not be Transmission Customers but which will bear responsibility for some SECA charges. It also provides

¹⁰ 16 U.S.C. § 824d(d) (2000).

¹¹ 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

for Midwest ISO to file unexecuted service agreements with the other entities that have not executed service agreements whether the entities request their submission or not. Attachment B of Schedule 22 lists the monthly SECA charge to be assigned to Green Mountain for the pertinent subzones of the American Transmission Systems, Inc. (“ATSI”) zone of Midwest ISO.¹² We find that Midwest ISO’s September 1 Filing lawfully implements Schedule 22, as accepted by the Commission, effective December 1, 2004.¹³

16. Green Mountain has already raised, in its rehearing request of the June 16 Order that accepted the SECA compliance filings,¹⁴ its argument concerning whether, under the FPA, the Commission can approve a transmission charge against an entity like Green Mountain that does not currently purchase transmission service from Midwest ISO.¹⁵ The Commission is aware further that, on September 6, 2005, Green Mountain notified the presiding administrative law judge in the hearing procedures in Docket No. ER05-6-001, *et al.*, of its intent to file a shift-to-shipper case against BP and two other companies, contending that its contractual arrangements with these three companies make them responsible for any and all SECA charges allocated to Green Mountain.

17. We find that the appropriate proceedings in which to address Green Mountain’s arguments is not this instant proceeding but rather the pending rehearing proceedings of the June 16 Order where Green Mountain’s arguments and similar arguments raised by other parties requesting rehearing can be addressed together and completely, and in the ongoing hearings on the SECA compliance filings, in which Green Mountain is an active participant. Therefore, we will not address in this proceeding whether, under Schedule 22, Midwest ISO can lawfully assess SECA charges against Green Mountain. Rather, consistent with the Commission’s previous orders upholding the levy of SECA charges pending the final outcome of the ongoing hearings and the pending rehearing proceeding,¹⁶ we will accept the unexecuted service agreements filed by Midwest ISO,

¹² Schedule 22 at section I & Appendix B.

¹³ See Commission orders cited in notes 1 - 4, *supra*.

¹⁴ See note 3, *supra*.

¹⁵ See Green Mountain’s July 18, 2005 Filing in Docket No. ER05-6-001, *et al.*, at 8-9 (Green Mountain’s Rehearing Request).

¹⁶ See February 10 Order at P 39; June 16 Order at P 38; *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,142 (2005) (stay of SECA charges denied).

subject to the eventual outcome of the proceedings in Docket No. ER05-6-001, *et al.*, and subject also to refund or surcharges, with interest.

18. We will deny Green Mountain's protest of Midwest ISO's requested effective dates of December 1, 2004 and April 1, 2005 for these five service agreements. We will grant waiver of the 60-day prior notice requirement and will also make the agreements effective on the dates requested. In *Central Hudson*, the Commission stated that it will generally grant waiver of the 60-day prior notice requirement when the change and the effective date are prescribed.¹⁷ As Green Mountain recognizes, the Commission may allow an effective date that is prior to the date that a rate was filed when the entity has notice of the effective date.¹⁸ Here, Midwest ISO filed the five unexecuted service agreements to implement the tariff provisions (Schedule 22) that the Commission had previously accepted¹⁹ as complying with the November 18 Order.²⁰ The November 18 Order also made the SECA rates effective on December 1, 2004.²¹ Thus, Green Mountain was on notice of the effective date for SECA charges. Moreover, Green Mountain has previously raised the same issue in its rehearing request in Docket No. ER05-6-001, *et al.*²² As discussed above, that rehearing proceeding and the ongoing hearing are the appropriate forums in which to determine the effective dates for SECA charges.

19. We will deny Green Mountain's requests to suspend the agreements for five months and to set the September 1 Filing for hearing. As noted above, the Commission has accepted the tariff provisions establishing Green Mountain's SECA responsibility. Also, there are ongoing hearings as to the justness and reasonableness of the SECA mechanism and the SECA charges with provision for possible refund and interest. For this reason, we see no reason to suspend acceptance of the unexecuted agreements other

¹⁷ See *Central Hudson* at 61,338.

¹⁸ See Green Mountain's Protest at 19 n.43, *citing Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (a rate adjustment may take effect prior to a section 205 filing when parties have notice that the rate is tentative and may be adjusted later with retroactive effect).

¹⁹ Notes 2-4, *supra*.

²⁰ November 18 Order at P 55-61.

²¹ *Id.* at P 61.

²² See Green Mountain's Rehearing Request at 6-8.

than nominally or to set the agreements for hearing. Accordingly, we will accept the five unexecuted agreements and suspend them nominally for one day.

The Commission orders:

The unexecuted agreements in Midwest ISO's September 1 Filing are hereby accepted for filing and suspended for one day, to become effective December 1, 2004, and April 1, 2005, as requested, subject to refund or surcharge, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.